Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

WESLEY J. BRAZAS, JR.,
Petitioner,

v.

MARIA C. BRAZAS, *et.al.*
Respondents.

On Petition for Writ of Certiorari
To the Illinois Appellate Court, 2nd District

PETITION FOR A WRIT OF CERTIORARI

Donna J. Laut
Counsel of Record
5 Blenmont Court
Phoenix, MD 21131
(410) 593-9992

Katherine Korda
319 Turtle Pond Road
Summerville, S.C. 29483
(843) 875-5122
Attorneys for Petitioner

QUESTIONS PRESENTED

1. Does a state court have inherent equitable power to force parents in a divorce proceeding to hire and pay for an attorney/guardian *ad litem* and psychologist/custody evaluator without running afoul of the 4th, 5th, and 14th Amendments?

2. Do §506 and §605 of the Illinois Marriage and Dissolution of Marriage Act violate the 4th, 5th, and 14th Amendments by providing a state court judge with unlimited discretion to force parents in a divorce proceeding to hire and pay for an attorney/guardian *ad litem* and psychologist/custody evaluator?

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Wesley J. Brazas, Jr. petitions for a Writ of Certiorari to review the judgment of the Illinois Appellate Court for the Second District in this case.

PARTIES TO THE PROCEEDINGS

The following individuals and entities are parties to the proceeding in the court below:

Wesley J. Brazas, as defendant in the divorce action, In re Marriage of Brazas.

Maria C. Brazas, as petitioner in the divorce action.

Attorney Jeff Rifken, as the court-appointed Guardian ad Litem for the minor children in the divorce action.

Ms. Ann Patla, Director of the Illinois Department of Public Aid, as intervenor in the divorce action.

OPINIONS BELOW

The opinion of the Illinois Appellate Court, Second District (Appendix A, page 1a) is an unpublished opinion pursuant to Illinois Supreme Court Rule 23. The decision of the Illinois Supreme Court to deny the applicant's Petition for Leave to Appeal (Appendix C, page 12a) is unreported. The orders of the 16th Judicial Circuit for the County of Kane, Illinois (Appendix D,E,F, pages 13a,15a,17a) are not reported.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review by writ of certiorari any "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be

had...where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution." 28 U.S.C. § 1257(a).

Petitioner seeks review of the Illinois Appellate Court, Second District's holding that state divorce court judges have inherent equitable power to appoint attorneys, guardians *ad litem*, and psychologists and compel the parties to pay for these services notwithstanding the violations of the Fourth, Fifth, and Fourteenth Amendments to the Constitution these services cause. Petitioner properly raised these federal claims in the court below as to the constitutionality of §§ 506 and 605 of the IMDMA which provides for the same judicial discretion the Illinois Appellate Court deemed "inherent." The Appellate Court noted these federal claims, but did not pass on the constitutionality of §§ 506 and 605 of the IMDMA. Instead, the Illinois Appellate Court relied on an independent state ground Petitioner maintains is inadequate to prevent review on the federal question. Accordingly, the questions to be presented in the petition plainly fall within the jurisdiction of this Court under 28 U.S.C. § 1257 (a).

NOTIFICATION OF THE STATE ATTORNEY GENERAL

Notice to the Attorney General for the State of Illinois was made pursuant to Rule 29(4)(b). In addition, the Illinois Department of Public Aid, with the Attorney General and/or Kane County State's Attorney representing her, is a party to this proceeding.

STATUTES INVOLVED

At the time of attorney Rifken's appointment as *Guardian ad Litem* (GAL) on November 19, 1993, Section 506 of the Illinois Marriage and Dissolution of Marriage Act provided:

> Representation of Child. The court may appoint an attorney to represent the interests of a minor or dependent child with respect to his support, custody and visitation. The court may also appoint an attorney as the guardian *ad litem* for the child. The court shall enter an order for costs, fees and disbursements in favor of the child's attorney and guardian *ad litem*, as the case may be. The order shall be made against either or both parents, or against the child's separate estate. (750 ILCS 5/506, West. 1994)

The judiciary is solely responsible for regulating the conduct and compensation of attorneys appointed as guardians ad litem under §506, either through enactment of Supreme Court Rules, or by precedent setting decisions. The state executive and legislature do not provide funding for the costs and fees of the court-appointed attorney GAL. The fees and costs are borne entirely by the parties.

Section 605 of the Illinois Marriage and Dissolution of Marriage Act provides:

> Investigations and Reports.
> (a) In contested custody proceedings, and in other custody proceedings if a parent or the child's custodian so requests, the

court may order an investigation and report concerning custodial arrangements for the child. The investigation and report may be made by the Department of Children and Family Services.

(b) In preparing his report concerning a child, the investigator may consult any person who may have information about the child and his potential custodial arrangements. Under order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric or other expert persons who have served the child in the past, without obtaining the consent of the parents or the child's custodian. The child's consent must be obtained if he has reached the age of 16, unless the court finds that he lacks mental capacity to consent.

(c) The investigator shall mail the report to counsel, and to any party not represented by counsel, at least 10 days prior to the hearing. The court may examine and consider the investigator's report in determining custody. The investigator shall make available to counsel, and to any party not represented by counsel, the investigator's file of underlying date, reports, and the complete texts of diagnostic reports made to the investigator pursuant to the provisions

> of subsection (b) of this Section, and the names and addresses of all persons whom the investigator has consulted. Any party to the proceeding may call the investigator, or any person whom he has consulted, as a court's witness, for cross-examination. A party may not waive his right of cross-examination prior to the hearing. (750 ILCS 5/605, West. 1994).

Again, it is the judiciary that is solely responsible for regulating the conduct of psychologists, custody evaluators or other "investigators" appointed under §605 either through Supreme Court Rules or precedent setting decisions. The state executive and legislature do not provide funding to provide for the costs and fees of the court-appointed investigators. The fees and costs are borne entirely by the parties.

STATEMENT OF THE CASE

On November 6, 1992, the Petitioner's wife, Maria C. Brazas, filed a standard pro forma Petition for Dissolution of Marriage alleging irreconcilable differences as the grounds for dissolution and paid the requisite filing fee of $198.00 to cover court costs. There were no allegations of neglect, abuse, domestic violence, or unfitness. The disputed issues were custody, child support and maintenance, distribution of marital property and payment of the parties' attorneys fees. With the wife's attorney rejecting mediation or any other means to amicably settle the claims out of court, acrimony and litigation increased substantially as the proceedings continued. The case was initially assigned to Judge Edmondson.

On September 1, 1993, Petitioner's hearing for financial relief and modification of the temporary custody order of April 19th began, but was not completed. Petitioner argued that said order was unscrupulously achieved while the Petitioner was on temporary military duty. The wife volleyed back in separate motions on October 7th to appoint an *Attorney for the Minor Children* (AFMC) and on November 4th to appoint a GAL. Petitioner filed his objections to both motions. On November 4th, during the continuation of Petitioner's financial relief and custody hearing, the Court specifically found that any consideration of the appointment of a GAL was premature and that no reports would be available until the well after the conclusion of the pending hearing.

Nevertheless, two weeks later, on November 19, 1993, the Court held an in-chambers pre-trial conference. At the conclusion of the in-chambers conference, the Court *sua sponte* appointed attorney Jeff Rifken as GAL, and also appointed psychologist Dr. Michael Chiappetta to conduct a custody evaluation. Each party was ordered to pay a lump sum fee of $750.00 to Dr. Chiappetta and a $350.00 fee to attorney Rifken (Appendix D, page 13a). The Court did not hold an open hearing on the need and duties of the GAL and psychologist, nor does the appointment order define their duties or the Court's expectation the fees would exceed the lump sum defined by the Order.

Thereafter, the Petitioner, a civil engineer with a specialty in structural engineering, had extensive difficulties with these "services." Even though time was of the essence in completing the custody evaluation, Dr. Chiappetta refused to initially interview Petitioner until the $750.00 fee was prepaid in full. Furthermore, Dr. Chiappetta wanted to expand his customary evaluation by requesting home visits and interviews from any interested family member of the parties. On February 15, 1994, when Petitioner advised the Court Dr. Chiappetta intended to

substantially exceed the $750.00 set by the November 19th Order, the Court ordered GAL Rifken to advise Dr. Chiappetta to reduce his services to a "Wendy's" versus "La Français" custody evaluation, because the parties could not afford the latter.

The method of Dr. Chiappetta's custody evaluation consisted of approximately five hours of interviews with each parent and the completion of the following tests or inventories: 1) children's problem checklist, 2) alcohol use inventory, 3) Henmon-Nelson, 4) MMPI-2 and 5) MMCI-II. In addition, the wife's maternal grandmother was the only third party who accepted the Doctor's invitation to be interviewed. At the end of these evaluations and interviews, Dr. Chiappetta based his report in part on various *ex-parte* allegations of the wife and her mother (allegations that they would not repeat under oath at trial), and concluded that it would be in the children's "best interests" if a third party was awarded custody of the children, with the Doctor recommending the wife's maternal grandmother as the preferred and proper custodial parent.

The total cost of Dr. Chiappetta's "services" amounted to $2,650.00. Mr. Brazas was ordered to pay $1,525.00 of this sum; Mrs. Brazas was to pay the remaining $1,125.00.

On February 15, 1994, the Court concluded Petitioner's temporary financial relief hearing, which had began six months earlier, and ordered Petitioner to underwithhold on his income taxes, not pay the real estate taxes on the marital residence and let them go to tax sale, not pay his credit cards and let them go into default and not pay his attorney in order to "generate the funds necessary to enable us to complete the child custody litigation." The Court also set trial for August 1, 2, 3 and 4, 1994.

On August 1, 1994, eight months after his appointment and the first day of trial, GAL Rifken finally submitted his GAL report to the court. The only out-of-court time GAL Rifken had observing the children before trial was billing for a 1.5 hour visit with the wife at the marital home on December 8, 1993, billing for a 1 hour visit with Petitioner at the home of the Petitioner's parents on December 20th and billing for a 2 ½ hour visit to the wife's maternal grandmother's home on June 20, 1994. GAL Rifken reiterated Dr. Chiappetta's conclusion that it would be in the children's best interests if custody was in a third party, such as the wife's maternal grandmother.

On December 30, 1994, in the middle of the Petitioner's case-in-chief, the Court held a hearing for interim GAL fees. Although attorney Rifken testified he had never discussed with the Court or the parties what was the scope of his GAL investigation or that his fees would exceed the $700.00 ($350 x 2) specified by the November 19th Order, GAL Rifken nonetheless petitioned for $17,195.00 in interim fees, which the Court awarded him (Appendix E, page 15a). GAL Rifken then became a party in interest to the proceedings by immediately obtaining a judgment lien for his fees against the marital home and subsequently demanding the sale of the marital home.

After a total of seventeen days of trial and the testimony of sixteen witnesses, on December 12, 1995, the Court issued a partial Judgment for Dissolution of Marriage awarding custody to the wife and distributing the marital property. However, the Court reserved the issue of the parties' attorneys' fees and additional GAL fees for later determination.

Judge Edmondson then recused himself from the case and subsequent motions were heard by numerous

different judges. Partially as a result of the lack of continuity, the wife and assistant State's Attorney Elizabeth Lovig (on behalf of the Illinois Department of Public Aid, which had intervened on behalf of the wife under Title IV-D) were able to appear before a new judge and make untruthful statements about the whearabouts of husband, who was on temporary military duty. As a consequence of such untruthful statements, the court issued a body writ for the arrest of the Petitioner. The following month, Judge Klein vacated the erroneous body writ.

On April 28, 1997, Judge Klein awarded GAL Rifken an additional $16,885.62 in interim GAL fees (Appendix F, page 16a). Of the $34,645.62 in attorneys fees charged to date by GAL Rifken, less than 1% was in direct observation of the parents with their children.

However, Judge Klein was unable to complete the remaining issues regarding fees for Petitioner's attorneys. Therefore, on September 18, 1998, Judge Klein was ordered removed and the Illinois Supreme Court assigned Judge Pemberton to the case.

On November 24, 1998, Maria Brazas was granted a discharge under Section 727 of Title 11 of the U.S. Bankruptcy Code. GAL Rifken would later argue in the Circuit Court and the Appellate Court that the issuance of the bankruptcy court's discharge order made the divorce final and appealable. The Circuit Court and Appellate Court rejected this reasoning in the decision currently on appeal before this Court.

On June 18, 1999, Judge Pemberton decided the remaining issues. The Petitioner timely filed a Notice of Appeal and the Appellate Court scheduled oral argument for June 13, 2000. However, the Court then cancelled oral argument and on June 6, 2000, the Appellate Court issued

its unpublished opinion under S.Ct. Rule 23 affirming the trial court (Appendix A, page 1a). On July 27, 2000, the Appellate Court denied applicant's Petition for a Rehearing (Appendix B, page 11a).

On August 17, 2000, the applicant filed his Petition for Leave to Appeal to the Illinois Supreme Court as a matter of right under Illinois Supreme Court Rule 317. The petition was denied on October 4, 2000 (Appendix C, page 12a).

On December 21, 2000, this Court in Application No. 00A537 granted an Extension of Time to File a Petition for Writ of Certiorari to March 3, 2001.

REASONS FOR GRANTING THE WRIT

I.

THE FEDERAL QUESTION

The Illinois Appellate Court for the Second District, a court of last resort, has decided an important federal question that is repugnant to our republican form of government. The Illinois Appellate Court holding that courts have unlimited inherent power to intrude upon the fundamentally protected rights of the parent-child relationship is not based upon our Constitution, but on an extension of a medieval monarchical system of government our founding fathers expressly rejected. In our Constitutional system of government, the state judiciary has limited enumerated powers subject to Constitutional constraints just as does the legislature. *Shelley v. Kraemer*, 334 U.S. 1,18 (1948).

The federal question is whether the judiciary, in the context of a dissolution proceeding, has unlimited inherent power to appoint and demand the parents pay

for an attorney/guardian ad litem and/or psychologist/custody evaluator to intrude upon the federally protected parent-child rights under the 4th, 5th, and 14th Amendments under the deception the court can make a "better" custody determination?

Concomitantly, can the legislature, by enacting 750 ILCS 5/506 and 605, grant the judiciary the power to appoint and demand that the parents pay for an attorney/guardian ad litem and/or psychologist/custody evaluator to intrude upon the federally protected parent-child rights under the 4th, 5th, and 14th Amendments under the deception the court can make a "better" custody determination?

The answer is no. Furthermore, the Appellate Court's conclusion that the Petitioner waived his right not to be subjected to psychological exams is unsupported by the record. At a minimum, this Court should grant the petition for writ of certiorari, to "analyze the facts in order that the appropriate enforcement of the federal right may be assured." *Norris v. State of Alabama*, 294 U.S. 587 (1935).

II.

A STATE DIVORCE COURT JUDGE WHO APPOINTS AND COMPELS PAYMENT OF $39,000 FOR ATTORNEY/GAL AND PSYCHOLOGIST/CUSTODY EVALUATOR SERVICES DOES MORE THAN INTERPRET LAW.

In *Mayer v. Roe*, 432 U.S. 464, 479 (1977), this Court recognized that when "an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature." When a state divorce court judge, acting under his judicial discretion, determines he needs the services of a GAL and/or

psychologist to make a "better" custody decision as to which parties are going to have attorney and psychological "services" paid by the parties and not public funds, a judge is no longer interpreting law, but is setting social policy and legislating. In this case, there is no reason why this Court should defer to a state judicial opinion that by *ipse dixit* sanctions its own unconstitutional actions.

The Illinois Court's authority to appoint a GAL and a psychologist in a divorce action by way of its "inherent power" is very similar to the power exercised by the Royal Court of the Star Chamber that was popular in England during the 16th and 17th centuries. See, e.g. *Faretta v. California*, 422 U.S. 806 (1975) (describing in general terms the Star Chamber).

The Star Chamber was "ruthless, efficient, and secret(ive)" and allowed to be so because of three systemic policies and procedures[1]. First, the English Monarchy wrested control from the aristocracy by not depending on parliamentary funds for their policies. Second, the English Monarchy did not rely upon a professional civil service or bureaucracy to administer its policies, but rather relied upon unpaid local officials to apprehend and punish criminals, enforce statutes and regulate moral behavior. Third, the Court of Star Chamber dealt with aristocratic troublemakers by torture, harassment and by depriving the accused of his procedural and substantive rights.

The court appointments whether by "inherent equitable power" or pursuant to §§ 506 or 605 are systemically identical to the Star Chamber. First, the court orders the parties to fund the GAL, thereby making

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[1] McKay, Hill, Buckler, A History of Western Society, *Volume I: From Antiquity to the Enlightenment* 403-404 (Houghton Mifflin Company 1979).

the judiciary independent of Congress and the legislature for public funding and the auditing and accountability required when using appropriated funds.

Second, the bureaucracy responsible for administering the program of court appointed GALs and investigators in the context of a divorce proceeding is the judiciary itself. There is no independent oversight as there is in the context of a child abuse and neglect proceeding.

Third, the judge has unlimited discretion as to when to appoint, unlimited discretion as to what these state actors can do, and unlimited discretion as to what these state actors can charge and bill against the parents. A parent's only oversight remedy is through the financially burdensome process of appellate review years after the damage of the initial appointment is done.

The Illinois Appellate Court for the Second District becomes the first court to extend its legitimate power of appointing a GAL for a minor in a probate case far afield to appointing GALs in divorce cases. The sole authority for the Illinois Appellate Court's conclusion that it had inherent equitable power was the dictum in *Pelham v. Griesheimer*, 440 N.E.2d 96, 101 (1982). *Pelham* itself is a curious case. In *Pelham*, the Illinois Supreme Court refused to recognize a cause of action for the children of a divorce against their mother's divorce attorney for his failing to properly secure an asset granted to the mother in a divorce proceeding. The Illinois Supreme Court, in dictum, inferred that the claim could have been avoided had the children been parties to the divorce through the court's "inherent equitable power to appoint a guardian *ad litem* for minors interested in litigation." This dictum was based on two cases, *Flynn v. Flynn*, 119 N.E. 304 (Ill. 1918) and *In re Estate of Viehman*, 197 N.E.2d 494 (Ill. App. 1964), both of which dealt with the appointment of a guardian *ad litem* under the Illinois Probate Act.

The Illinois Appellate Court's holding is based on an inadequate state ground. The doctrine of *parens patriae* recognizes the need to appoint a guardian *ad litem* to act *in loco parentis* to represent a minor in the settlement of an estate because the parent(s) are dead and the estate needs to be administered in order to ensure the continuity of title.[2] It is a completely different matter when the state steps in to interfere with two fit parents seeking to start their lives anew with their children, and the state exhorts money from this family for this purpose.[3] Furthermore, there was no American common law basis for the Appellate Court's conclusion that courts had "inherent" authority beyond statutory authority. Marriage and divorce in England was regulated by English ecclesiastical courts, while marriage and divorce in America, being secular and not religious, has always been regulated by the legislature.[4] See also, *Maynard v. Hill*, 125 U.S. 190, 209 (1888).

III.

THERE IS A DIRECT POSITIVE RELATIONSHIP BETWEEN THE WEALTH OF THE PARTIES AND THE LEVEL OF INTERVENTION ALLOWED TO DETERMINE THE ISSUE OF CUSTODY IN A DIVORCE PROCEEDING

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[2] Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C.L.R. 205, 211 (1971).

[3] *Id.* at 225. See, also, L. Friedman, A History of American Law 212-218 (2nd ed., Simon & Schuster, Inc. 1985).

[4] L. Friedman, A History of American Law 202-208 (2nd ed., Simon & Schuster, Inc. 1985).

Judges unquestionably are participating in a legislative function *in toto* when they appoint a GAL or psychologist in a divorce proceeding. The policy set by a divorce court judge, whether by "inherent" or statutory authority is 1) wealthy people get "services," 2) these "services" do not have to be beneficial, and 3) the judiciary justifies the state interference with fundamental liberties and rights on the judicially subjective grounds of the "best interests of the children."

To illustrate, a trial court judge in California set a policy that 1) parties with a combined income of $250,000 were entitled to a "La Français" evaluation and investigation, 2) the services were of dubious benefit since they did not establish the fact used to justify the evaluation and 3) the interference was substantial, but justified on the grounds of being for the "best interest" of the minor child.[5] A "La Français" evaluation is as follows:

1. Psychologist appointed by San Francisco Child Protective Services:	$2,924
2. Parent/Child Visitation Supervisor:	$7,950
3. Custody evaluator:	$15,334
4. Psychological testing:	$13,000
5. Child's court-appointed therapist:	$11,780
6. Family law mediator:	$20,630
7. Court appointed G.A.L.:	$75,821
Total court appointed costs to decide custody:	$147,447[6]

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[5] *In re Chang*, 163 F.3d 1138 (9th Cir. 1998), *cert. denied sub nom., Chang v. Beaupid*, 526 U.S. 1149 (1999)(See Petition for Writ of Certiorari, Statement of Facts).

[6] *In re Chang*, 163 F.3d 1138 (9th Cir. 1998), *cert. denied sub nom., Chang v. Beaupid*, 526 U.S. 1149 (1999)(See Petition for Writ of Certiorari, Statement of Facts).

In Petitioner's case, college-educated professionals with modest income and property are given a "Wendy's" custody evaluation as follows:

1. Psychologist/custody evaluator:	$ 2,650.00
2. Attorney/GAL:	$34,645.62
Total court appointed costs to decide custody:	$37,295.62

A bill for nearly $150,000 for a doctor and $40,000 for a civil engineer to decide the issue of custody is shocking in light of the fact that it only costs $198.00 to file a divorce petition in Illinois. By comparison, juvenile proceedings, in which child abuse and neglect are typically alleged, the nation-wide average GAL bill is only $300-$1,500 per case.[7] Are the court appointed costs for fit parents getting a divorce over 100 times the costs of a juvenile neglect proceeding simply because the divorcing parties are wealthy?

In divorce court, these "services" supposedly allow a judge to make a better decision about the custodial arrangements between two fit parents who were once previously married. In abuse and neglect cases, "services" are used to determine whether the state should intervene. For example, according to the Congressional GAL Validation Study, 39% of the children needing advocacy and investigation services were in foster care, 15.9% were

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[7] U.S. Department of Health and Human Services, National Center on Child Abuse and Neglect, *Final Report on the Validation and Effectiveness Study of Legal Representation Through Guardian Ad Litem* (Washington, D.C.: National Clearinghouse, 1994)(hereinafter referred to Congressional GAL Validation Study); See also, State of Minnesota Office of the Legislative Auditor, Guardian Ad Litem, No. 95-03,26(February, 1995) (average cost for GAL in Minnesota is estimated at $377); Utah 1994 audit: Guardian Ad Litem, p.10 (report 93-06)(average GAL time spent on a child abuse and neglect case is 3 hours).

in a relative's home which sometimes met the requirements of a foster home, 24.3% were living either with the noncustodial parent or in a group home, shelter, hospital or adoptive home, with only 20.8% in the original home of the custodial parent.[8] As to the targeted population of abused and neglected children, the Study found that 73.7% of the minor children suffered from neglect, 36.2% suffered from physical abuse and 23.6% suffered from sexual abuse.[9] There does not appear to be any cases in which "emotional abuse" was a factor.

The determination of custody in an abuse and neglect case is one that implicates whether a state will terminate parental rights, e.g. *Santowsky v. Kramer*, 455 U.S. 745 (1982), whereas a divorce, in which fit parents plead for primary custodial responsibilities. One would expect more services to be provided in the abuse and neglect cases, yet this is not the case. Where the need is the greatest, there is the least intrusion and where the need is the least there is the greatest intrusion. It may be that these "services" cause irreparable damage to the parent-child relationship.

To illustrate, a Maryland divorce judge compelled the parties to hire a guardian *ad litem* two months after he determined temporary custody of the minor children should be with the mother. See, *Auclair v. Auclair*, 730 A.2d 1260,1263 (Md. Ct.Spec.App. 1999). The GAL in *Auclair* did not provide any facts on the issue regarding the preference of the three intelligent, articulate, and mature minors that their father visit them in accordance with their school schedules versus his work schedule. Despite the fact that this issue could have been easily decided by the judge, the GAL interpreted facts in a bizarre and twisted way that can only be construed as an

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[8] See, Supra, note 7, *Congressional GAL Validation Study* at 4-23.
[9] *Id.* at 4-22.

attempt to justify her appointment. Children who articulate a preference must be "brainwashed," or subject to the "emotional investment by the children in the mother's issues," or communicating a preference that is nothing more than "brainwashing techniques used by Communist forces against American soldiers in the 40s and 50s." *Id.*, 730 A.2d at 1263.

It is a common theme amongst state divorce judges to ignore the preferences of mature, articulate, minors because they are "brainwashed" and appoint a GAL or attorney for them to represent their "best interests" and at the same time, if they object, deny their request for their own non-state sponsored attorney. See, *Auclair v. Auclair* 730 A.2d 1260,1276 (1999)[10]; *Miller v. Miller*, 677 A.2d 64, 69, n. 8 (Me. 1996); *but cf. Faretta v. California*, 422 U.S. 806 (1975);[11]*Bellotti v. Baird*, 443 U.S. 622 (1979)(state court judge could not veto abortion decision of minor found to be capable of giving informed consent); *Ohio v. Akron Reproductive Health Center*, 497 U.S. 502, 508 (1990) (mature minor seeking to avoid abortion notice requirement can retain her own lawyer instead of GAL); *Carey v. Population Services*, 431 U.S. 678, 699(1977)(state could not delegate authority to doctors to determine which minors could or could not receive contraceptives because of the inherent risk of arbitrariness).

After receiving useless services, most consumers are afforded the opportunity to object by refusing payment. This not an option in divorce court. If the parents own real estate, a judgment lien can be issued simultaneously with the judgment. Where the attorneys fees for the parties'

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[10] The Maryland Special Court of Appeals in *Auclair v. Auclair* based its holding on an analysis of state law in Alaska, Arizona, Colorado, Connecticut, Illinois, Iowa, Maine, Maryland, Montana, New York, Ohio, Wisconsin, and Wyoming.

[11] *Farretta v. California* held that a defendant in a criminal suit had a right not to exercise his right to counsel.

own lawyers are dischargeable in bankruptcy, the fees for the GAL, lawyer or any other investigator are considered in Illinois as "debts in the nature of alimony, maintenance, or support" and therefore not dischargeable. See, *In re* Chang, 163 F.3d 1138 (9th Cir. 1998), *cert. denied sub nom., Chang v. Beaupid, 526 U.S. 1149 (1999).* Given this debt's special status as "support," violation of an order for payment can subject the parties to sanctions for contempt, which include the possibility of coercive or punitive jail time or, loss of a professional license. [12]

If the state's interest in protecting children during a divorce justifies the appointment of a guardian *ad litem* and investigator, then the issue must be decided as a matter of public policy by the legislature and public funds must be used. Clear, uniform standards and procedures must be implemented to ensure that basic liberties are protected. Otherwise, divorce court is not a court of law, but a Star Chamber.

IV.

COMPELLING PARTIES AND THEIR CHILDREN TO SUBMIT TO AN ATTORNEY AND PSYCHOLOGIST VIOLATES THE 4TH AMENDMENT PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES.

The court order appointing the GAL and child psychologist is nothing more than a warrant to investigate and search a parent's home and his person through psychological testing and attorney interviews. Both the GAL and psychologists are state actors, even if construed as acting *in loco parentis,* and therefore their activities

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[12] See, e.g. 750 ILCS 5/713 (2000)(Attachment of the Body); 5 ILCS 100/10-65(c) (2000)(non-attorney professionals must certify that they are not delinquent in child support to renew professional license).

amount to state action. See, *New Jersey v. T.L.O.*, 469 U.S. 325, 335-336 (1984). The fact that this "search and seizure" occurs in the context of a divorce court and not juvenile or criminal court does not mean that the Fourth Amendment requirements of a warrant do not apply. See, e.g., *Camara v. Municiapl Court*, 387 U.S. 465, 475 (1967)(building inspectors); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-313 (1978)(OSHA inspectors) and *Michigan v. Tyler*, 436 U.S. 499, 506 (1978)(firefighters). The fact that a judge may not really suspect criminal behavior like child abuse and neglect does not make the search and seizure by the GAL and psychologist any more reasonable or tolerable.[13] See also, *New Jersey v. T.L.O.*, 469 U.S. at 335.

A Fourth Amendment search is not limited to physical trespass into legally protected areas, but includes all intrusions upon the privacy of the individual. *Jones v. Latexo Independent School District*, 499 F.Supp.223, 231 (1980)(citing *Olmstead v. United States*, 277 U.S. 438 (1928); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Schmerber v. California*, 384 U.S. 757 (1966)). The court-appointed GAL conducted a seizure of the parents and their children because they were not free to ignore the court order which ordered them to "submit" to the attorney/GAL and psychologist. The court-appointed GAL also conducted a search of the marital home when he conducted his interview with the children there and also when he conducted his interview at the home of the applicant's parents' residence. This Court has consistently held that

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[13] In a study of GALs in the Connecticut area done as research for the note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 Yale L.J. 1126, 1160, n.162 (1978), one GAL described this carte blanche access as follows: "[I]t was kind of sad; he was kind of like sniffling through the whole thing, and it bothered me, but I felt it was like a necessary operation. But that is what worried me: you normally don't know how deep you want to go down."

warrantless searches of homes are per se unreasonable and therefore the search and seizure in the case at bar violated the Fourth Amendment.

The court-appointed psychologist or custody evaluator likewise conducted a Fourth Amendment search when he interviewed the children and parties and required the parties to undergo psychological testing and evaluating.

V.
COMPELLING PARTIES TO SUBMIT TO AND BE INTERVIEWED BY ATTORNEYS AND PSYCHOLOGISTS VIOLATES THE 5TH AMENDMENT'S PROHIBITION AGAINST SELF-INCRIMINATION

A psychological evaluation of dubious evidentiary value in the context of a divorce proceeding[14] is no less invasive than a lie detector test and, for this reason, violates the 5th Amendment's prohibition against self-incrimination. See, *Schmerber v. California*, 384 U.S. 757, 760-765 (1966) (distinguishing tests that compel testimonials versus physical evidence). Attorneys and psychologists, through interviews and tests, compel testimonials that may or may not be used against the parents under the jurisdiction of a court as a result of a

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[14] The Plaintiff was required to take the Minnesota Multiphasic Personality Inventory (MMPI-2) which is "designed to assess significant functional disorders in the neurotic characterological and psychotic spectra." Clinical Handbook of Child Psychiatry and the Law,42 (Diane H. Schetky & Elissa P. Benedeck eds., 1992) He was also forced to take the Millon Clinical Multiaxial Inventory (MCMI-II) which is "designed to assess DSM-III-R personality disorders, though it is normed on individuals who are in the early stages of treatment, and may provide an overestimate of problems in other populations."*Id* at 42..

divorce pleading and for that reason violate the 5th Amendment's prohibition against self-incrimination.

VI.
COMPELLING THE PARTIES TO PAY $39,000 FOR THE FEES OF THE GAL AND PSYCHOLOGIST VIOLATES THE PETITIONER'S 5TH AMENDMENT RIGHT NOT TO BE DEPRIVED OF HIS PRIVATE PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION.

The divorce court judge ordered payment for services that were not requested by the Petitioner. The court either imposed a tax or exercised a taking. The fact that the legislature could not convince the public that it needed to appropriate funds for a GAL program in divorce court shows that there is not much of a state interest behind this type of regulation. Ordering the Petitioner to pay attorney and psychological fees and costs is nothing more than an unconstitutional appropriation of personal property for an illegitimate public use. See, *Kaiser Aetna v. United States*, 444 U.S. 164, 178-179 (1979).

VII.
SECTIONS 506 AND 605 OF THE IMDMA ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED BECAUSE THE APPOINTMENT OF A GAL AND PSYCHOLOGIST IS A STATE INTERVENTION THAT IMPERMISSIBLY INFRINGES UPON THE FUNDAMENTAL RIGHTS OF THE CHILDREN AND THEIR PARENTS TO PROPERTY, PRIVACY, AND FAMILY AUTONOMY PROTECTED BY THE 14TH AMENDMENT'S DUE PROCESS CLAUSE

Typically, the only parties to a divorce were the parents. On occasion, other parties, such as, relatives who may have an interest in real estate that is also considered part of the marital estate, have intervened. Relatively recently, the courts have ordered children to be parties to the proceedings through court-appointed attorneys and guardians *ad litem*. It is misleading, although true, to say that all the states in the union have statutory language allowing a judge to appoint attorneys and guardians *ad litem* in custody cases. This is true because through CAPTA[15], states must have a GAL program in order to receive funding for child abuse and neglect prevention programs and child abuse and neglect cases are "custody" cases. Divorce cases are also "custody" cases, but there is no Congressional grant-in-aid or state program providing funding for attorney, GAL and psychological services. It is more accurate to say that all states have a GAL program in place for abuse and neglect cases and that some states, like Illinois, have incorporated the appointment power into their divorce code and solved the funding problem by charging fees directly from the divorcing parents.

§§ 506 and 605 are unconstitutional on their face

The GAL "system" in divorce would not be so pernicious if there was public accountability and public funding for the program. Not that public funding alone would solve all the problems, but at least it would provide checks and balances against abuses. In fact, legal scholarship discussing the use of attorneys and guardians *ad litem* in the context of divorce custody ignore this fact.[16]

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[15]See *supra* note 7, Child Abuse Prevention and Treatment Act (CAPTA)(Public Law [P.L.] 93-247, as amended by P.L. 95-266), 42 U.S.C. 5101 et seq.

[16] Kubie, *Provisions for the Children of Divorced Parents: A New Legal Instrument*, 73 Yale L.J. 1197,1199 (1964)("each child shall have one trusted adult-ally outside the family circle with whom the child can talk in confidence."); Kleinfeld, *The Balance of Power*

The majority of citizens in Illinois have effectively stated that the state interest in providing attorneys, guardian *ad litem*, and psychological "services" in divorce is not sufficiently great to justify raising taxes to pay for these services. That is a policy based on the weighing of costs and benefits, the quintessential function of the legislature.

Divorce participants expect that they will pay the posted filing fees for the use of the courts. They do not expect that they will pay $40,000 or $150,000 to have a judge decide the issue of custody. This Court held in *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) that a Pennsylvania statute which allowed a jury to assess litigation costs against acquitted defendants was unconstitutional on its face under the Due Process Clause of the 14th Amendment because it lacked even the most basic "understandable meaning with legal standards that courts must enforce." The same is true here. There is absolutely no limit to the number or experts or the amount of fees they can charge. The judge is given total and

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Among Infants, Their Parents and the State, 4 Family L.Q. 320 (1970); Foster & Freed, *A Bill of Rights for Children*, 6 Fam. L.Q. 343,354-355 (1973)("One of the most frequent complaints children make with regard to adult behavior is that grown ups won't listen to them....The right to be heard includes the right to have standing in legal proceedings to assert one's claims of interest."); Rodham, *Children Under the Law*, 43 H.E.R. 487 (1973)(republished as HER Classics Series No. 5, Classic Articles from the Harvard Educational Review 1931-2000; Podell, *The "Why" Behind Appointing Guardians ad litem for Children in Divorce Proceedings*, 57 Marq. L. Rev. 103 (1973);Note, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 Hastings L.J. 917 (1976)(procedural due process rights and not substantive due process rights);Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 Yale L. J. 1126 (1978); Ardagh, *California Civil Code Section 4606: Separate Representation for Children in Dissolution Custody Proceedings*, 14 U.S.F.L.Rev. 571 (1980).

absolute, unchecked discretion to appoint whomever, whenever, and for whatever and the parties just have to pay.

In *M.L.B. v. S.L.J.* 519 U.S. 102, 106 (1996), this Court recognized the state's monopolization of the means for legally dissolving a marriage. The court's appointment of GALs is simply a mechanism whereby the state seeks to reap monopoly profits. The state's interest in reducing litigation costs is not substantial enough to justify denying divorcing parties access to the divorce court. See, *Bodie v. Connecticut,* 401 U.S. 371, 382 (1971). Nor is it constitutional to condition adjudication upon the payment of a "custody tax." If it is illegal to condition marriage upon the payment of child support, *Zablocki v. Redhail,* 434 U.S. 374 (1978), it is just as unconstitutional to condition the right to a divorce upon payment of a custody tax.

The government may not infringe upon property interests and, in addition, may not infringe upon "fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993). Privacy and family autonomy have long been recognized by this Court as being such fundamental liberty interests.

This Court's recent opinion in *Troxel v. Granville,* 530 U.S.__, (2000) made it clear that the "best interest" of a child would not be used as a tool or justification for a state to intervene into the matters of an existing and intact family. This is not to say that the "best interest" standard cannot be used to evaluate a custody claim between two divorcing fit parents. This is to say, however, that jurisdiction over the issue of custody as a consequence of two parents dissolving their marriage does not mean that

the state may create an adversarial parent-child relationship simply because they happen to be before the court.

There is an immense difference between a trial judge evaluating the evidence proffered by the parents to determine a child's best interest, even if it is contrary to an agreement made by the parents, *Ford v. Ford*, 371 U.S. 187 (1962) versus the same trial judge controlling the investigation and creation of evidence by appointing a GAL to advocate what the "best interests of the children" should be. Having the trial judge controlling the investigating, advocating, and creating evidence is an additional, substantial state intrusion.

State courts have often blurred the distinction between finding facts and advocating on behalf of a child in a case in which the state has already intervened and the child(ren) in question are in the custody of a third party versus a case where the child is still in the custody of his fit biological parents. For example, Wisconsin court decisions very often rely on the Wisconsin Supreme Court's per *curiam* order in *Edwards v. Edwards*, 71 N.W.2d 366,367 (Wisc. 1955) that recommended to the trial court upon remand that a guardian *ad litem* be appointed and investigate facts as support for the general proposition that a guardian *ad litem* should be appointed in all divorce cases[17].

In *Edwards*, a divorce case unfortunately became an abuse and neglect case after the father was found unfit (and his son sent to a foster home) as a result of the father shooting out the tires of his ex-wife's car as she was driving away with the son. 70 N.W. 2d (Wisc. 1955). The Due Process requirement for a judicial determination that

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[17] Podell, *The "Why" Behind Appointing Guardians ad litem for Children in Divorce Proceedings*, 57 Marq. L. Rev. 103 (1973).

a guardian *ad litem* could provide facts about a third party that would weigh into any conclusion whether the father should be unidfied with his son has now been ignored by subsequent cases and statutory language requiring the appointment of a guardian *ad litem* in the context of a divorce custody adjudication.

It cannot be doubted that involving attorneys and psychological "experts" in a custody dispute is incredibly invasive to both the parents and the children involved. Although involved in divorce proceedings, both parents and children retain their constitutional rights to privacy. The state not only permits but actually mandates that these already traumatized individuals "pour out their hearts" to complete strangers. These same strangers - people with whom the family members might have refused to associate at all were the potential consequences not so serious - then retain the family's secrets for decades.

There is a specific harm that these attorney and psychological "experts" cause a child of impressionable age, and that is the loss of family autonomy and trust. Imagine the message sent to children—the state is here to protect you from mommy and daddy. How can a child trust a parent's decision to discipline, protect, educate, nurture, and support after the state, for no apparent reason, has shown that parental decisions cannot be trusted. See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) ("[t]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association").

Adding a GAL to the custody litigation is a burden that amounts to an infringement of a parent's constitutional right to make "certain basic determinations for the child's welfare." *Troxel v. Granville*, 530 U.S.____

(O'Connor, Slip. Op. 17)(2000). The "results" of these psychological tests and attorney interviews are part of the court record and can be viewed by any member of public interested enough to look at a court file. By basing their conclusions on hearsay, the GAL's and psychologist's conclusions are oftentimes baseless and easily impeached at trial, but a child would not know that. How does any parent defend himself against "concerns" a GAL has over his parenting abilities? There is no need to give parties psychological evaluations on a generalized claim that they might indicate a person's emotional well-being. See, *Soroka v. Dayton Hudson Corp.*, 1 Cal.Rptr.2d 99(Cal.App. 1991)..

Children do not need "advocates" in a divorce custody case. A guardian *ad litem* appointed under the doctrine *in loco parentis* steps in and advocates for the child just as if he were the parent. Albert Solnit, Director at Yale's Child Study Center, suggested that a parent advocates for his child when he takes him to the doctor or nurse for "diagnostic, therapeutic, or child-rearing advice.[18]" Solnit views this as "protecting children and assuring that their rights and priorities are safeguarded and supported." [19] Advocacy therefore implicates the parental decision making rights that are protected by the 14th Amendment. See, *Troxel v. Granville*, 530 U.S. __ (O'Connor, Slip. Op. 6-8), (2000).

Sections 506 and 605 should be struck as being unconstitutional on their face because every appointment of an attorney, guardian *ad litem*, and psychologist, aside from the funding issue, interferes with property, privacy, and family autonomy. These statutes should be struck as facially invalid because the issue is not whether the judge

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[18] Albert J. Sonit, M.D., *Child-Rearing and Child Advocacy*, BYU L. Rev. 723 ,727 (1976).

[19] Supra, note 18 at 727.

applied his discretion wisely or poorly, it is whether he enjoys too much discretion in every case See, *City of Chicago v. Morales,* 527 U.S. 41, 71 (1999) (Breyer, J., concurring in part and concurring in judgment).

§§ 506 and 605 are unconstitutional as applied to the facts of this case

In the present case, it appears that the trial judge appointed a GAL and psychologist for the illegitimate purpose of dramatically increasing the cost and intrusion of the litigation to coerce the parties to settle. The order appointing GAL Rifken and Dr. Chiappetta was made *sua sponte* after a pre-trial conference in which Maria's attorney adamantly refused the court's suggestion for mediation. The trial court could have set a date for a hearing immediately upon the filing of the motion, but waited until the temporary financial issues were decided. At the conclusion of the temporary relief hearing, the court ordered the GAL to communicate to the psychologist that the evaluation should be a "Wendy's" version and not a "La Français version. Clearly the level of services was directly related to how much the judge at the time believed the parties could afford.

The appointment order of November 19, 1993 itself indicates very little about what are the reasons for the appointment, the duties and responsibilities of the state actors and the rights of the parties. The order never said that the amount paid up front was merely a retainer and that the actual amount would be substantially more. There is just no legitimate reason why the court ordered a guardian ad litem and psychologist in this case and ordered the Petitioner to pay almost $40,000. The court lacked "inherent authority" to appoint a GAL/attorney and psychologist in this case. Likewise, §§ 506 and 605, as applied here, violated the Petitioner's Due Process rights to property, privacy, and family autonomy.

CONCLUSION

The petition for certiorari should be granted,

Respectfully submitted,

Donna J. Laut
Counsel of Record
5 Blenmont Court
Phoenix, MD 21131
(410) 593-9992

Katherine Korda
319 Turtle Pond Road
Summerville, S.C. 29483
(843) 875-5122

Attorneys for Petitioner

March 1, 2001

APPENDIX A - OPINION OF THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT, DATED AND FILED JUNE 6, 2000 IN IRMO *BRAZAS v. BRAZAS*, No. 2-99-0833:

No. 2—99—0833

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

In re THE MARRIAGE OF	)	Appeal from the
MARIA C. BRAZAS,	)	Circuit Court of
MS. ANN PATLA, Director,	)	Kane County.
Illinois Department of	)	
Public Aid,	)	No. 92—D--1556
	)	
Petitioners-Appellees	)	Honorable
	)	Stephen C.
and	)	Pemberton,
	)	Chief Judge R. Peter
WESLEY J. BRAZAS, JR.	)	Grometer, Chief
	)	Circuit Judge Gene
Respondent-Appellant.	)	L. Nottolini, Wiley
	)	W. Edmondson,
	)	Kurt P. Klein,
	)	James Donnelly,
	)	F. Keith Brown and
	)	James C. Hallock,
	)	Judges, Presiding.

RULE 23 ORDER
This Order Is Not Precedential And Is Not To Be Cited
Filed June 6, 2000

Respondent, Wesley J. Brazas, Jr., appeals from various orders of the trial court, the latest of which was entered on June 18, 1999, denying respondent's motion for attorney fees and granting petitioner's motion for judgment on the pleadings. We affirm.

This cause has been before this court twice before. See In re Marriage of Brazas, 278 Ill.App.3d 1 (1996); In re Marriage of Brazas, 2–97–0610 May 19, 1998 (unpublished order pursuant to Supreme Court Rule 23). We will limit our discussion only to the facts relevant to the disposition of this appeal.

We first address the motion to dismiss the appeal filed by the guardian ad litem Jeff Rifken. In the May 19, 1998, Rule 23 Order, this court concluded that it did not have jurisdiction to entertain Wesley's appeal, as among other things, the order from which the appeal was taken was not final and appealable; petitions for attorney fees were still pending against petitioner Maria C. Brazas. However, on November 24, 1998, the United States Bankruptcy Court entered an order discharging Maria from the potential claim for fees. Rifken argues that this discharge made the matter ripe for review and that Wesley's notice of appeal should have been filed within 30 days of the November 29, 1998 order. In fact, the notice of appeal was filed on July 19, 1999.

We disagree. The trial court had continued the case "generally" prior to the Bankruptcy Court decision and several times after the decision. The issue of attorney fees was still taken under advisement by the trial court on June 9, 1999. while the bankruptcy decision may have answered the remaining questions before the trial court, the trial court still retained jurisdiction over the cause. Therefore, the notice of appeal was not due within 30 days

of the November 29, 1999 order, and we deny Rifken's motion to dismiss.

Wesley first contends that the trial court erred in appointing Rifken as guardian ad litem (GAL) and awarding him fees, as the statute under which the appointment was made is unconstitutional. However, courts have always had inherent equitable power to appoint a guardian ad litem for minors interested in litigation. Pelham v. Griesheimer, 92 Ill. 2d 13, 24 (1982). Assuming, arguendo, that section 506 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/506 (West 1998)) is something more than a simple codification of the court's inherent authority, the court's equitable powers to appoint a guardian ad litem allowed for such an appointment here. Thus, we need not determine whether the statute is unconstitutional either facially or applied; the trial court had the inherent, equitable authority to appoint a GAL to protect the interests of the children.

Wesley, relying on In re Marriage of Kekstadt, 85 Ill. App. 3d 952 (1980), argues that, because the jurisdiction of equity courts to hear divorce cases is conferred by statute, equity courts have no inherent power in dissolution cases. However, this reliance is misplaced. Kekstadt involved the trial court's attempt to modify property division provisions of the dissolution decree more than 30 days after the entry of the decree, raising issues regarding property rights created by the decree and jurisdiction of the court to address the decree. See Kekstadt, 85 Ill. App. 3d at 955-56. There, the trial court did not have jurisdiction to entertain the case, and its equity powers could not be used to give it jurisdiction. Here, the (sic) is no disputing the jurisdiction of the trial court; therefore, its inherent equitable powers may be exercised within the jurisdiction that the trial court has. Therefore, the appointment of Rifken was not unconstitutional.

Wesley next contends that the trial court abused its discretion in appointing Rifken as GAL and awarding him over $34,000 in fees without holding an evidentiary hearing and without a showing of need. However, Wesley never objected to the appointment of a GAL. He only requested that mediation be required before determining whether a GAL was necessary and that the court hold a hearing regarding the financial abilities of the parties to pay for a GAL. A hearing regarding the parties' finances was held prior to Rifken's appointment. Since he did not raise this objection in the trial court, he cannot raise it for the first time here on appeal. See In re Marriage of Adams, 174 Ill App. 3d 595, 618 (1988) reversed on other grounds, In re Marriage of Adams, 133 Ill. 2d 437 (1990)). Therefore, we find this issue waived.

Wesley next contends that Rifken failed to timely file his appearance as GAL; therefore, the trial court had no jurisdiction over Rifken, and the award of fees to Rifken was an abuse of discretion. Rifken did not file an appearance until 21 months had passed since his appointment. However, this case was able to proceed for that period with no inconvenience or confusion for the court or the parties as to whom Rifken represented. See In re Marriage of Pitulla, 202 Ill. App. 3d 103, 120 (1990). Rifken participated fully in the proceedings, filing pleadings and receiving notice as to all proceedings from the other parties. Furthermore, a written court order clearly identified Rifken as GAL for the children. Any error was minimized by the order and the parties' recognition of Rifken as GAL. Therefore, we find no prejudicial error on this issue.

Wesley next contends that the contract for GAL was unenforceable as a contract of adhesion. According to Wesley, the contract failed to address an objective limit on the term of Rifken's appointment, the scope of Rifken's

services in relation to a compelling state interest, his compensation, and the benefits to Wesley's children. This argument is based on the previous arguments regarding the constitutionality of the GAL statute and the failure of Rifken to immediately file his appearance. We have previously found no reversible error in those arguments and refuse to do so now.

Wesley next contends that the trial court erred in appointing a psychologist, Dr. Michael Chiappetta, to conduct a custody evaluation without first holding an evidentiary hearing and without a showing of need. Wesley never objected to Dr. Chiappetta's appointment in the trial court, never challenged the constitutionality of such an appointment before this appeal, and is unable to cite relevant authority in his argument. Therefore, we find this issue waived.

Wesley next contends that the trial court erred in denying his motion for indirect criminal contempt against Maria Brazas and assistant State's Attorney Elizabeth Lovig. The filing sought to require Maria and Lovig to show cause why they should not be held in indirect criminal contempt of court for allegedly making false statements about Wesley's whereabouts when Wesley was allegedly out of town on reserve military duty. However, a motion for a rule to show cause is not the proper method for initiating indirect criminal contempt proceedings; rules to show cause and criminal contempt proceedings involve different procedural steps and burdens. See In re Marriage of Betts, 200 Ill. App. 3d 26, 58-59 (1990). In a criminal contempt proceeding, the contemnor is entitled to the privilege against self-incrimination, the presumption of innocence, and the right to be proved guilty beyond a reasonable doubt. In re Marriage of Cummings, 222 Ill. App. 3d 943, 948 (1991). By definition, if a person has a privilege against self-incrimination, he cannot be required to show cause why he should not be held in contempt.

See Betts, 200 Ill. App. 3d at 58-59. Furthermore, requiring one to show cause why he or she should not be held in contempt impermissibly shifts the burden of proof to the contemnor. Cummings, 222 Ill. App. 3d at 948. Wesley's motion was improperly brought, and the trial court did not err in denying the motion.

Wesley next contends that the trial court erred in holding trial in this matter because the judges of the 16th Judicial Circuit have a routine practice of seeking campaign contributions from associate judges and from attorneys who are prospective GALs and then needlessly appointing these attorneys as GALs. The associate judges contribute to the campaign funds and also needlessly appoint GALs to curry favor for future judicial races. In this case, Chief Judge Gene Nottolini, who denied Wesley's motion for change of venue, had received contributions to his campaign fund from several judges and "[e]asily identifiable GAL's [sic]," including $100 from Rifken. However, Wesley can point to no prejudicial actions by any of the judges involved other than the appointment of Rifken as GAL and the denial of his motion for a change of venue. Allegations that a judge has made rulings, even erroneous rulings, against a party are not allegations of personal prejudice; a demonstration of actual prejudice is required. In re Marriage of Perlmutter, 225 Ill. App. 3d 362, 383 (1992). Wesley unsuccessfully attempts to create a vast web of conspiracy, but fails to demonstrate any actual prejudice. We find no merit in this argument.

Wesley next contends that the trial court abused its discretion in awarding custody of the parties' minor children to Maria. A trial court's determination will not be disturbed an appeal unless it is against the manifest weight of the evidence or manifestly unjust, or there has been a clear abuse of discretion. In re Marriage of Diehl, 221 Ill. App. 3d 410, 424 (1991). Wesley's arguments

completely fail to address the evidence regarding custody of the children and concentrates instead on Maria's lack of "clean hands" in a judgment entered against him, Dr. Chiappetta's fees and Maria's earnings and employment during the trial. This rambling argument does not sustain Wesley's burden, and we will not reverse the custody decision of the trial court.

Wesley next contends that the trial court erred in its division of marital property. Marital property is to be divided in just proportions after the court considers all relevant statutory provisions. In re Marriage of Jacks, 200 Ill. App. 3d 112, 118-19 (1990). An equitable distribution is not necessarily an equal one, and mathematical precision is not required. Jacks, 200 Ill. App. 3d at 119. the trial court's distribution of assets will not be disturbed on appeal absent an abuse of discretion.

Wesley argues that Maria was awarded $115,223.16 of property from a marital estate of $53,708.75, while he was awarded only debt of $61,512.41. Wesley was awarded the marital home, with a net equity of approximately $51,000. the court concluded that it had no option but to award the residence to Wesley, as he had clouded title and possession by executing a quit claim deed on the driveway (an easement, which was the only method of ingress and egress for the property), which he unilaterally conveyed to his parents. Wesley attempts to decrease the value of the property by deducting from the equity the value of the easement, which he quitclaimed in violation of the court's injunction, past-due mortgage payments, an estimated sales commission on a theoretical future sale of the house, and real estate taxes, including taxes that were not imposed until after the judgment. Wesley also received a 1991 Pontiac Firebird, several pensions, part of a 401K account, an employee stock option plan, and several bank accounts, certificates of deposit and individual retirement accounts which the

court concluded that he had dissipated. Wesley also was awarded a substantial amount of credit card debt, which the court concluded Wesley incurred for his own benefit. These debts total approximately $20,000. Wesley was also to pay approximately $5,000 in past due income taxes, $8,000 for a loan he had taken from his mother-in-law, and delinquent real estate taxes.

Maria received a 1988 Suburban, part of a 401K plan, a dining room set, a microscope, valued at $8,500, and several certificates of deposit, individual retirement accounts, and bank accounts, which the court concluded that she had dissipated. She was also given $3,000 in credit card debt and $5,000 of own student loans.

We cannot conclude that the trial court's division of property was an abuse of discretion. Wesley's actions regarding the easement on the property gave the court no option but to award the marital house to Wesley. Very few other assets remained. Most of the financial assets awarded to either party were already dissipated by the parties. As to the division of debt, the trial court made each party responsible for the debt that they had incurred for their own benefit or had failed to pay in the past. The division may not have been equal, but it was not manifestly inequitable based on the parties actions. We find no error here.

Wesley also argues that the court erred in concluding that certain bank accounts held in the names of Maria and her mother were not marital property. While correctly arguing that property acquired after the marriage and before a judgment of dissolution of marriage is presumed to be marital property (see 750 ILCS 5/503(b) (West 1994)), Wesley merely alleges that Maria concealed income in these accounts without citation to anything in the record that would tend to support his argument. Without more, we find no error here.

Wesley next contends that the trial court erred in awarding Maria $60,000 as maintenance in gross. However, his arguments are that Maria already received too much marital property, that payment of maintenance places him in more debt, and that Maria's proposed judgment of dissolution only asked for $12,000 maintenance-in-gross. Wesley never addresses the statutory requirements of maintenance and thus fails to demonstrate to this court that the trial court committed error in awarding the $60,000. We find no error here.

Wesley next contends that the trial court erred by limiting his visitation with his children. In the judgment of dissolution, the trial court ordered that Wesley "not exercise any overnight visitation in the former marital residence" that defendant received in the property settlement. Wesley argues that raising his family is a fundamental right that can only be impinged upon when the State demonstrates a legitimate compelling interest that is necessary to accomplish the State's purpose. See West v. West, 294 Ill. App. 3d 356, 364 (1998).

A trial court has wide discretion in resolving visitation issues, and this court will not interfere with such a determination unless the trial court abuses its discretion or where manifest injustice has been done to a child or parent. Diehl, 221 Ill. App. 3d at 429. Liberal visitation is the rule; restricted visitation is the exception. Diehl, 221 Ill. App. 3d at 429. However, the constitutionally protected interest of parents to raise their children without undue State interference is not wholly without limit or beyond regulation. See West, 294 Ill. App. 3d at 359-60. Visitation may be restricted if the court finds that visitation would seriously endanger a child's physical, mental, moral, or emotional health. Here, the evidence presented at trial showed a home which had never received an occupancy permit and had failed several

inspections. Many rooms throughout the house were incomplete, missing drywall, flooring, and grout. Plumbing was incomplete. The physical health of the children was at stake in a building in such a state of disarray; an occupancy permit was not even issued for the building. We find no error in the court's order that the children not stay overnight in such a dangerous place.

Maria moves in her brief for sanctions against Wesley because of his misrepresentations of law and fact as well as false pleadings. Our review of the record in this case reveals questionable tactics and mean-spiritedness on both sides. Wesley's appeal is not frivolous to the point of being sanctionable. Therefore, we deny Maria's motion for sanctions.

For these reasons, the judgment of the circuit court of Kane County is affirmed.

Affirmed.

McLAREN, J., with INGLIS and GEIGER, JJ., concurring.

APPENDIX B – ORDER OF THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT, DENYING MOTION FOR RECONSIDERATION DATED AND FILED JULY 13, 2000:

STATE OF ILLINOIS APPELLATE COURT
SECOND DISTRICT
APPELLATE COURT BUILDING
ELGIN, ILLINOIS
60120-5558

OFFICE OF THE CLERK
847/695-3750
847/695-0092 TDD

Appeal from the Circuit Court of County of Kane
Trial Court No.: 92D1556, DKA921556

THE COURT HAS OF THIS DAY, 07/13/00, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-99-0833
IRMO: Brazas, Wesley J. & Maria C.

Upon consideration of the Petition for Rehearing filed by appellant, the Petition for Rehearing is hereby denied.
(McLaren, Inglis, Geiger, JJ.)

LOREN J. STROTZ
Clerk

cc: Wesley J. Brazas, Jr.
Kanelos, Kanelos & Tichenor, P.C.
Mark J. Kanelos
Judith A. Tichenor
Honorable David R. Akemann
Patricia Johnson Lord
Brittain & Ketcham, P.C. Jeffrey B. Rifken

APPENDIX C - ORDER OF THE ILLINOIS SUPREME COURT DATED AND FILED OCTOBER 4, 2000 DENYING PETITONER'S PETITION FOR LEAVE TO APPEAL:

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

October 4, 2000

Mr. Wesley J. Brazas, Jr.
44W331 Big Timber Road
Hampshire, IL 60140

No. 90086 - In re The Marriage of Maria C. Brazas et al.,etc., respondents. v. Wesley J. Brazas, Jr.,petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 26, 2000.

APPENDIX D – ORDER APPOINTING ATTORNEY AND GUARDIAN AD LITEM AND PSYCHOLOGIST OF THE KANE COUNTY COURT, 16TH JUDICIAL CIRCUIT DATED AND FILED ON NOVEMBER 19, 1993:

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT

KANE COUNTY, ILLINOIS

GEN.NO. D-KA-92-1556
o JURY o NON-JURY

Maria C. Brazas — Wesley J. Brazas

VS.

PLAINTIFF(S) — DEFENDANT (S)

JUDGE Edmondson	COURT REPORTER	PLTF. ATTY. Carbary	X
DEPUTY CLERK		DEF. ATTY. Simpson	X

ORDER

Cause coming for pre-trial & the Court being advised orders as follows; on the court's own motion

1. That Wes Brazas is no longer required to pay for schooling at ECC for Maria Brazas. That portion of the prior order so requiring same is suspended until the pending hearing scheduled for February is completed or the Court rules further thereon, with the mother being brought before the court by Mrs. Brazas by notice.

2. That attorney Jeff Rifken is appointed as G.A.L. for the minor children. Each party is required to pay $350.00

without prejudice to final allocation of fees to attorney Rifken.

3. That Michael Chiappetta is appointed to conduct a custody evaluation of the parties & the minors. Each party is ordered to pay him $750.00 without predudice to final allocation & each party is ordered to submit themselves & the children as requested.

ENTER: /s/ Wiley W. Edmondson
JUDGE

DATE: 11-18-93 (sic)

APPENDIX E - INTERIM ORDER FOR ATTORNEY'S FEES FOR GUARDIAN AD LITEM OF THE KANE COUNTY COURT, 16TH JUDICIAL CIRCUITE DATED DECEMBER 30, 1994.

IN THE CIRCUIT COURT FOR THE SIXTEENTH
JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

GEN.NO. D-KA-92-1556

IN RE: THE MARRIAGE OF
MARIA C. BRAZAS,
PLAINTIFF;

VS.

WESLEY J. BRAZAS, JR.,
DEFENDANT.

Judge Edmondson	Plaintiff's Attorney J Carbary **X**
-Check if Present-	Defendant's Attorney D Laut **X**
	Guardian AL J Rifken **X**

ORDER

This cause having come to be heard upon proper notice on the *guardian ad litem's* petition for fees brought pursuant to § 506 of the Illinois Marriage and Dissolution of Marriage Act, the court having heard argument of counsel and testimony of witnesses and finding that the hourly rate of $ 150.00 is reasonable^ *just and fair* for said guardian fees*, and that the activities he has billed for are appropriate^*and necessary to represent the children's best interest,* and the Court being fully advised in the premises:

**and commensurate with Kane County attorneys of equal skill and experience*

IT IS ORDERED THAT:

1. Joint and several Judgment is entered in favor of Jeff Rifken and against Maria C. Brazas and Wesley J. Brazas, Jr. in the amount of $ 17,760.00 as and for partial guardian's fees., subject to further order for allocation of same pursuant to section 508 and/or 506.

2. There is no just reason to stay appeal from this order.

3. Defendant's oral motion that this order be considered an order contemplated in Supreme Court Rule 308 is denied.

ENTER: /s/ Wiley W. Edmondson
JUDGE

DATE: December 30, 1994

Brittain & Ketcham, P.C.
Jeff Rifken, Atty. #02337517
1695 Larkin Avenue, Elgin, IL 60123
Phone 708-742-6100

APPENDIX F - INTERIM ORDER FOR ATTORNEY'S FEES FOR GUARDIAN AD LITEM OF THE KANE COUNTY COURT, 16TH JUDICIAL CIRCUITE DATED APRIL 28, 1997:

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

Gen. No. 92-D-KA-1556

In re: The Marriage of :	)	
Maria C. Brazas	)	Wesley J. Brazas, Jr.
	)	
Plaintiff (s)	)	Defendant(s)
Present in Open Court ☐	)	Present in Open Court ☐

JUDGE Klein	COURT REPORTER Debbie H.	PLTF. ATTY. Pro se	X
DEPUTY CLERK 105		DEF. ATTY. Pro se	X
		J. Rifken G.A.L.	X

FAMILY COURT GENERAL ORDER

IT IS ORDERED THAT:

☐ A. Setting/Continuance

☐ This cause is set on _____ 199____ at _____ a.m./p.m. before Judge _____ in courtroom no. _____ for:

☐ Status/Setting

☐ Matter continued by:

_____

- ☐ Hearing on

  _____

- ☐ Prove-Up
- ☐ Trial: Setting No.:

  _____

  - ☐ S. Ct. Rule 220 Cut-Off Date is _____
  - ☐ Discovery Cut-Off Date is _____
  - ☐ Final Pretrial is set for _____ at _____ a.m./p.m. before _____
  - ☐ Attorneys are ordered to appear 1 hour prior to trial to mark Exhibits and Stipulations
  - ☐ Strike pending date(s) of :

    _____

- ▪ **B. Judgment**
  - ☐ Judgment is entered in favor of _____ and against _____ in the amount of $ _____.
  - ▪ (Pursuant to 750 ILCS 5/~~508(a) or (b)~~ 506 (strike one):
  - ▪ G.A.L.'s ~~Attorneys'~~ fees are found to be fair, reasonable and necessary and a judgment is hereby entered in favor of Brittain & Ketcham, P.C. and Jeff Rifken and against Wesley J. Brazas, Jr. and Maria C. Brazas in the amount of $ 16, 885.62
  - ▪ Allocation of ~~attorneys~~' G.A.L.'s fees is reserved for further order of Court.

☐ **C. Default:** The Defendant, having failed to answer or otherwise plead as required, is hereby found to be in default and an Order of Default is entered.

☐ **D. Dismissed without prejudice.**

☐ **Miscellaneous Findings/Orders:** _____

ENTER: /s/ Kurt P. Klein

Date: 4-28-97 (Judge)

Receipt Acknowledged: _____